

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION,)

et al.,)

Plaintiffs,)

v.)

Civil Action No.
98-CV-5591

ALBERTO R. GONZALES, in his official)

capacity as Attorney General of)

the United States,)

Defendant.)

**DEFENDANT'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR LEAVE OF COURT TO DESIGNATE DR. DAVID
FINKELHOR AS AN EXPERT FOR DEFENDANT**

1. Defendant, Attorney General Alberto R. Gonzales, seeks leave of Court to designate Dr. David Finkelhor to testify as an expert for defendant, as the critical evidence Dr. Finkelhor would testify to are the results and analysis as contained in the August 9, 2006 Online Victimization of Youth: Five Years Later report ("the report") regarding exposure of youth to unwanted sexual material online, and the efficacy of filters and other blocking software.

2. Plaintiffs' argument that Dr. Finkelhor is merely one of three authors of the report, Plaintiffs' Memorandum in Opposition ("Pl. Opp.") at 1, is mistaken. Dr. Finkelhor, who is a noted sociologist and the Director of the Crimes Against Children Research Center, is the principal and supervisory author of the report and wrote large portions of it.

3. Equally incorrect is plaintiffs' argument that defendant failed to comply with the discovery rules and the Court's Orders in bringing the August 9, 2006 report to plaintiffs'

attention when he did. Defendant cannot reasonably be faulted for alerting plaintiffs of the publicly available report only after defendant's counsel learned of it.

4. Plaintiffs, who objected to defendant attaching to his motion the publicly available report, now criticize defendant for not having attached Dr. Finkelhor's curriculum vitae. Pl. Opp at 6. Defendant will provide plaintiffs with Dr. Finkelhor's curriculum vitae and all other Rule 26(a) (2) disclosures, once the Court has allowed defendant to designate him as defendant's expert.

5. Contrary to plaintiffs' assertion that defendant does not explain why he needs Dr. Finkelhor's expert testimony, Pl. Opp. at 4, defendant has provided the reasons in paragraphs 13 and 14 of defendant's motion. Specifically, defendant needs to present Dr. Finkelhor's expert testimony and analysis regarding online victimization of youth. Defendant's Motion For Leave of Court to Designate Dr. David Finkelhor as an Expert for Defendant ("Def. Mtn.") at ¶ 13. Moreover, defendant needs to present Dr. Finkelhor's expert testimony regarding exposure of unwanted sexual material to youth, Internet usage regarding this topic, and filtering and other software which attempts to block such material.¹ Def. Mtn. at ¶ 14.

6. The report was not prepared as a result of or for use in this case. The fact that it was funded in part by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, should be of no consequence to the Court's

¹Defendant notes, and plaintiffs do not dispute, Pl. Opp. at 3, that Dr. Finkelhor could present the majority of his testimony as a lay witness. But that would result in an artificial limitation upon the expertise of a witness, merely because his expert opinions were unknown and could not have been exchanged before the close of discovery. Indeed, that would deprive the Court of Dr. Finkelhor's highly relevant and germane expert testimony, particularly in light of the filtering software and technology issues for which the Supreme Court has remanded this matter. See Ashcroft v. ACLU, 542 U.S. 656, 671 (2004).

determination of whether Dr. Finkelhor should be designated defendant's expert.

WHEREFORE, defendant respectfully requests that his motion for leave to designate Dr. Finkelhor as an expert for defendant be granted.

Dated: September 20, 2006

Respectfully Submitted,

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